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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 GREGORY L. BROWN,

11 Petitioner,

12 v.

13 KEN CLARK, Warden,

14 Respondent.  
15

No. C 08-3502 MMC (PR)

**ORDER OF DISMISSAL**

**(Docket Nos. 2, 3)**

16 On July 22, 2008, petitioner, a California prisoner proceeding pro se, filed the above-  
17 titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has  
18 applied for leave to proceed in forma pauperis.

19 For the reasons set forth below, the Court finds the petition is subject to dismissal  
20 because petitioner has not sought or obtained authorization to file a second or successive  
21 petition under 28 U.S.C. § 2244(b)(3).

22 **BACKGROUND**

23 On May 25, 1995, in the Superior Court of San Francisco County, petitioner was  
24 convicted of conspiracy to commit murder and attempted murder. He was sentenced to a  
25 term of fifty-six years to life in state prison.

26 Petitioner previously filed in this district a habeas corpus petition challenging the 1995  
27 conviction. See Brown v. Hickman, C 98-2013 MMC (PR). On December 18, 1998, the  
28 Court denied the petition on the merits. (See id. Docket No. 28.) Subsequently, the Court

1 denied petitioner's request for a certificate of appealability, as did the Ninth Circuit. (See id.  
2 Docket Nos. 34 & 37.)

3 In the instant petition, petitioner challenges the validity of the 1995 conviction on  
4 grounds of ineffective assistance of trial and appellate counsel, prosecutorial misconduct,  
5 juror misconduct, and insufficiency of the evidence.

### 6 DISCUSSION

7 A claim presented in a second or successive habeas corpus petition under 28 U.S.C. §  
8 2254 that was presented in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1). A  
9 claim presented in a second or successive habeas corpus petition under § 2254 that was not  
10 presented in a prior petition must also be dismissed, unless: (1) the claim relies on a new rule  
11 of constitutional law, made retroactive to cases on collateral review by the Supreme Court, or  
12 (2) the factual predicate for the claim could not have been discovered previously through the  
13 exercise of due diligence, and the facts underlying the claim would be sufficient to establish  
14 by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder  
15 would have found the petitioner guilty of the underlying offense. Id. § 2244(b)(2). Before a  
16 second or successive habeas petition may be filed in the district court, the petitioner must  
17 first obtain an order from the court of appeals authorizing the district court to consider the  
18 petition. Id. § 2244(b)(3)(A).

19 The instant petition presents claims challenging the 1995 conviction that was the  
20 subject of petitioner's prior federal habeas corpus petition. Consequently, petitioner may not  
21 proceed with such claims until he has sought or obtained an order from the Ninth Circuit  
22 authorizing him to file a second or successive petition in the district court. Accordingly, the  
23 instant petition must be dismissed without prejudice to petitioner's refiling the petition if he  
24 obtains the necessary order.<sup>1</sup>

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27 <sup>1</sup>Petitioner has filed a motion for appointment of counsel to represent him in this  
28 action. As the petition is subject to dismissal, the motion for appointment of counsel is  
hereby DENIED as moot. (Docket No. 3.)

**CONCLUSION**

For the reasons stated above, the petition is hereby DISMISSED without prejudice as a second or second successive petition under 28 U.S.C. § 2244(b).


In light of petitioner's lack of funds, the application to proceed in forma pauperis is hereby GRANTED. (Docket No. 2.)

This order terminates Docket Nos. 2 and 3.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: July 28, 2008

  
MAXINE M. CHESNEY  
United States District Judge